THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT ARUA

CIVIL APPEAL. NO. 0031 OF 2011

JABER TWALIB & ANO. _____ APPLELLANTS

=VERSUS=

GLOBAL HARDWARE CO. LTD_____RESPONDENT

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

FACTUAL BACKGROUND

1. The background to this appeal appears to have started from a case that looked a simple one going by the plaint. In the plaint filed in the Chief Magistrate's Court on 30/10/2009 M/s Global Hard Wares Co. Ltd sued the first defendant Jaber Twalib together with the second defendant M/s Uganda Road Aviation Transport Co. Ltd where the 1st defendant is a director.
2. The suit sought from court orders for eviction, vacant possession, permanent injunction against the defendants, general damages and costs of the suit. The claimed is alleged to have resulted from

tenancy agreement the plaintiff secured from Uganda Railways Corporation (herein after referred to as URC) to occupy under a one year tenancy premises located on plots 14 – 18 Go down road Arua municipality.

3. After execution of a formal tenancy agreement between the Uganda Railway Cooperation and itself, the plaintiff paid shs. 5.400.000/= for rent covering a period of one year. However the plaintiff's attempts to gain access to the let premises failed because the same was being occupied by the defendants. Attempts to have the defendants leave the building through the common landlord failed hence the suit in the court below by the plaintiff/current respondents for the orders I started above.

4. The two defendants filed a joint written statement of defence in which they denied all the allegations above and instead pleaded that they too had a tenancy over the same property with Uganda Railways Cooperative. They relied on a copy of tenancy agreement entered into on 01/04/2005 which was later exhibited in their evidence. It was further pleaded that the defendant's were rent paying tenants which rent was received by Uganda Railway Corporation.

5. Finally the defendants pleaded that they were not privy to the tenancy agreement between the plaintiff and Uganda Railways Corp. and as such they were not liable for its performance or breach at all.

6. By way of counterclaim the defendant/claimants also pleaded that by reason of having a valid tenancy in force and having paid rent to Uganda Railway Cooperation the counter claimant prayed that it be ordered by court that they are entitled to quit possession of the premises until their tenancy is validly terminated. They sought an injunction order damages and costs of the counter claim. For those

reason Uganda Railways Corporation was added as 2nd defendant to the counterclaim.

7. In the reply to the counterclaim by the 1st defendant, the above claims were denied. It was pleaded that by a letter dated 17/10/2009 annexed to the plaint as "F" the tenancy of the counter claimant was terminated and that way cannot be granted vacant possession.

8. The record does not show that the 2nd defendant to the counter claim was served or if so that it filed a written statement of defence to counter claim. However since this matter was commented on in the judgment of court below, I will return to it at the appropriate time.

9. ***ISSUES IN THE LOWER COURT***

In a joint scheduling memorandum three issues were framed, namely

1) Whether the plaintiff is the lawful tenant of plot 14 – 18 Go down road Arua Municipality.
2) Whether the defendants' tenancy expired by 30/09/2009.
3) Remedies available to the parties.

10. On the 15/12/2011 HW BARIGYE SAID Magistrate Grade I delivered his judgment and made the orders below;-

1. That the plaintiff is the lawful tenant of the premises located on plot 14-18 Go down road Arua Municipality.
2. The 2nd defendant's counter-claim against the plaintiff and Uganda Railways Corporation is dismissed with costs to the plaintiff.
3. The plaintiff and the defendant bear their own costs.

The judgment however had other orders not covered above

11. For the reasons he stated in his judgment he did not allow the plaintiffs claim for vacant possession, eviction order, damages as the plaintiff sued a wrong party.

12. The above decision aggrieved the appellant and filed this appeal based on 4 grounds excluding ground one which was abandoned. The grounds are not so concise in drafting as required by the rules of procedure but I will re-state them the way they were drafted. They are namely;-

Ground 2

The learned trial Magistrate mis-directed himself in entering judgment against the 1st appellant with an order that the respondent is the lawful tenant on the suit premises when he had already made a finding that it would have been URC to be sued as the defendants and not the appellants.

Ground 3

The trial Magistrate misdirected himself on the law when he dismissed the appellant's counterclaim on the grounds that it had no merit when it was never heard and went ahead to grant costs to the respondent.

Ground 4

The learned trial Magistrate erred in law and fact when he made a finding that the plaintiff/respondent's suit disclosed no cause of action against the 2nd appellant but went ahead to deny it costs.

Ground 5

The learned trial Magistrate erred in law and fact when he denied the 1st appellant costs when he had already made a finding that the respondent sued a wrong party.

13. At the trial Mr. Edward Kangaho of M/s KIZITO, LUMU & Co. Advocates represented the appellant while Mr. Samuel Ondoma from Alaka & Co. Advocates acted for the respondent. This appeal proceeded by way of written argument filed in court.

14. This is an appeal of first instance from the decision of the Magistrate Court grade I to the High Court. The duty of this court as the first court of appellate jurisdiction is settled law. In ***FREDRICK JK ZAABWE =VS= ORIENT BANK LTD & 5 ORS SC CA No. 4/2006*** Katurebe JSC stated;

> *"The duty of the first appellate court is well settled. It is to evaluate all the evidence that was before the trial court and arrive at its own conclusions as to whether the finding of the trial court can be supported ……by the evidence that was adduced before the trial Judge"* (read court).

15. Perhaps the East African Court of Appeal holding in ***SELLE & ANOTHER =VS= ASSOCIATED MOTOR BOAT CO. LTD & ANO [1968] EA 123*** throws more light on what this court is supposed to do. The EACA in that case held that;

> *"An appeal from the High* ***Court is by way of a re-trial and the court of appeal is not bound to follow the trial Judge's findings*** *of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally"* (emphasis added)

The emphasis I have put on the words ***"is by way of a re-trial and the court of appeal is not bound to follow the trial courts findings"*** is mine but applicable to this case.

16. In this appeal court will approach it preferably as a re-trial to establish whether the positions the trial Magistrate grade I reached on both questions of law and fact including the remedies the declared were justifiable in the circumstances of the case.

17. In order to approach this case a retrial I have read the judgment being appealed from, the submission of the both counsel in the court below and before this court and decided to frame issues for purposes of disposing of this appeal. The answer to the issues this court will frame will have a direct bearing on the ground of appeal to determine whether they succeed or fail.

18. For this court's power to frame issues in a trial or re-trial refer to CPR 0.15 r (2) and (15) as applicable here. Also see ***ODD JOB –VS- MUBIA [1970] EA 476, JOVELYN BARUGARE –VS- A.G. SC CA No. 28/1993*** and the judgment of ODOK JSC (as he then was) in ***SC CA No. 18 of 1994 J.D.C PRINCE MPUGA RUKIDI =VS= PRINCE SOLOMON IGURU & HON. KAJUKA & ORS,*** ODOK JSC stated;

> *"The trial Judge has a discretion to amend issues framed any time before passing judgment. The point however to be emphasized is the need to frame issues at the commencement of the hearing of any suit to guide the parties and court in addressing the batril issues in controversy".*

19. **ISSUES FRAMED FOR RE-TRIAL PURPOSES**

1) Whether the plaintiff has a cause of action against the 2nd defendant.
2) Whether the counterclaim was triable against both the defendants or any one of them.
3) Whether the defendants would have been sued by Uganda Railway Corporation instead of the plaintiffs by reason of privity doctrine.
4) Whether the plaintiff's pleadings were subject of an illegality by reason of offending the Public Procurement and Disposal of Public Assets Act 2003 with Regulation there under.
5) Whether the findings of the trial court to the effect that the plaintiff was the lawful tenant in the suit premises was supported by evidence, if so
6) Whether the trial court made or pronounced contradictory remedies to the parties.
7) Whether the trial court properly and judiciously exercised its discretion when it declined to awards costs to parties where it would have awarded the same. That is to say to the plaintiff, the defendant as both defendants and counter claimant.

This court will answer the issues above in the order they are stated, that from 1 to 7.

20. ISSUE ONE

Whether the plaintiff had a cause of action against the 2nd defendant.

The plaintiff pleaded in paragraph 4 of the plaint that its cause of action against the defendants jointly or severally was for vacant possession and eviction of the defendants by reason of trespass upon the suit land, damages and interest. To the plaint the plaintiff attached

annextures A, B, C, D, E and F. the annextures showed agreement atoning the plaintiff to occupy the premises, proof of payment of rent and a letter showing that the defendant has ceased.

21. In their submission in the court below none of the parties got interested in this issue. It was initiated by court. In his judgment HW SAID BARIGYE stated that court was addressing issues both parties did not address.

22. The learned trial Magistrate then went to rule that since the agreement under which the 2nd defendant was being sued had expired and was no longer a tenant of URC in the disputed property, the suit against it was misconceived. He justified his reasoning by adding that the 2nd defendant was not referred in the testimonies and submission. He then cited ***AUTO GARAGE –VS- MOTORKOV [1971] EA 514*** and concluded that the plaintiff had no cause of action against the 2nd defendant.

23. First of all the incorrect impression created by the trial court that the 2nd defendant was not referred to in pleadings and testimonies must be put straight. I have already said that in paragraph 4 of the plaint the plaintiff sued the defendants jointly and or severally. Secondly the annextures which were attached to the plaint particularly "E" referred to the agreement of tenancy dated 1st /10/2008 which tenancy was between the 2nd defendant and URC making the 2nd defendant a tenant and the same was said to have lapsed.

24. With respect to the trial court I believed it hurried and erred to conclude that there was no cause of action against the 2nd defendant.

The very case court relied on defines a cause of action in a wide manner. The holding in ***AUTO GARAGE –VS- MOTORKOV No. 3 [1971] EA 514*** at pg 519 by Spy V.P EACA is stated;

"*If a plaint shows that the plaintiff enjoyed a right that right has been violated and that the defendant is liable then a cause of action has been disclosed any omission or defect may be put right by amendment*".

See also **AG –VS- MAJOR GEN. DAVID TINYEFUNZA Constitutional Appeal No. 1 of 1997 S.C.**

25. In **NAROTTAM BUATIA & ANO =VS= BOUTIQUE SHAIM LTD SC CA NO. 16/2009 Kitumba JSC** and agreed with the reasoning as stated in Tinyefunza and Auto garage but added

"One must also look at the plaint and annextures attached thereto. One must also assume that the facts alleged are true".

26. If the trial court had applied that test correctly it would have concluded that by pleading the plaintiff had alleged that it has a right to occupy the suit premises. That it had failed to gain access to the suit premises and the defendants either severally or jointly were responsible for that failure.

27. By reason of the provisions of 0.1 r 3 CPR dealing with who may be joined as defendant and 0.1r7 dealing with a situation where the plaintiff is in doubt as to who to be sued, the plaintiff was at liberty to sue the 2nd defendant as the person who had the expired tenancy over the suit premises and never vacated the same.

I answer the first issue in the affirmative and hold that the trial court erred to have found that the plaintiff had no cause of action against the 2nd defendant.

28. ISSUE TWO

Whether the plaintiff would have been sued by Uganda Railways Corporation instead of the plaintiffs by reason of privity of contract.

29. This question stated by a pleading in the written statement of defence by the defendants paragraph 5 (a) where it was pleaded that the defendants were not privy to the tenancy agreement between the plaintiff and URC and as such they are not liable to its breach or performance.

30. In his judgment relying on the submission of counsel for the defendant and cases cited to the court HW BARIGYE concluded as below;

> "He cited the case of DUNLOP PHARMATIC TYRES –VS- SELFRIDGE 1915 AC 847 where it was observed that only those who are parties can sue or be sued. In this case I agree with counsel for the defendants that the defendant had tenancy agreement with URC, it would have been URC to sue the defendants …….the plaintiff had a good cause of action but sued a wrong party".

The trial court reasoned and concluded.

31. Privity of contract is an old basic contract law rule that a person who is not a party to a contract cannot derive any benefits from it. See ***learned author RW HODGIN Law of Contract in EAST AFRICA 1982 Edn pg 231***. It is therefore a pleading which would be relevant in causes of action founded on contract.

32. In the present case I have already stated that the plaintiff's cause of action was categorically stated to be in trespass seeking vacant possession of premises and damages. The cause of action never referred at all to any breach of contract or seeking performance of a

contractual term by any party. By reason of provisions of 0.6 r 7 CPR that it is the case the plaintiff pleaded and was bound to prove the arguments of counsel court believed were wrong. See ***ENTERFREIGHT FORWARDERS (U) LTD =VS= EA DEP'T BANK LTD C.C. No. 33 of 1993 SCU.***

33. Question which related to the two contracts entered into by URC with the plaintiff and the defendants were only evidential in nature but not the cause of action.

34. All the documents attached to the written statement of defence clearly show that the plaintiff had a cause of action against the two defendants and ought to have sued them.

- Annexture 'A' to the defence was between URC and the 2nd defendant.
- The payment under annexture 'B' was effected by the 1st defendant.
- All subsequent rent payment after the execution of the tenancy agreement were mostly in the names of the 1st defendant the exception are payment dated 28/09/2001 and that of 28/10/2004.
- In annexture Cs the language the advocate used suggested that he was handling a case involving both the defendants.
- Then annexture 'E' to the plaint shows how the URC had terminated the contract of tenancy requiring the defendant to vacate the premises.

35. I have identified the above document as documents on which each of the parties' case depended and never required the application of the doctrine of privy of contract to be applied. The documents show that while the plaintiff accused the defendants of trespass the defendants

denied it and attempted to prove existence of a contract by the reason of rent payment.

36. I therefore conclude that it was an error for the trial court to have ruled that it would have been URC to sue the defendant for vacant possession based on privity of contract

As I found that the plaintiff had a cause of action against the defendants it equally on its own had the locus to start an action in trespass without requiring URC to do so on grounds privity. The doctrine had no application or relevance to a suit founded on trespass with respect to the trial court.

ISSUE 3

37. ***Whether the counter claim was triable against both defendants to the counterclaim or any one of them.***

38. In his judgment the trial Magistrate dismissed the counter claim on two grounds. The first ground was that the 2nd defendant to the counter claim being URC was not served with the pleadings and summons to file defence see 0.8 r 9 CPR. The record of proceedings also showed no proof to that effect. Secondly, that the counter claimant did not pursue the counter claim against the 1st defendant to the counter claim. This court's answer to the above issue will be separate in respect of each defendant to the counter claim.

39. I have perused the record of proceedings of the trial court I have not found proof of service upon the 2nd defendant to the counter claim. Equally it was not argued by the learned counsel for the appellant that the trial court's finding was in error. It is taken by this court that URC was not served with the counter claim. It follows that it can not be affected by proceedings it was not aware of.

40. If the appellants wanted to proceed exparte against such a party it must do so in conformity with 0.5 r 7, 8 and 10 CPR failure of which the defendants deemed to have not be effectively served. See ***MB AUTOMOBILE =VS= KAMPALA BUS SERVICE [1966] EA 480 and Civil Appeal No. 45/2008 BAROROLA and DR. KASIRIVU & ORS –VS- GRACE BAMURANGYE.***

I agree with the trial court's decision not to try the counter claim against the 2nd defendant to the counter claim in absence of proof of service.

41. The trial court refused to consider the counter claimant case against the 1st defendant in the counter claim on the grounds that it was abandoned. I have revisited the record there is no minute of that effect. Both parties were represented in the court below. The defendant's advocate never asked court that the counter claim was being abandoned. Court assumed the abandonment of the claim on its own.

42. To the contrary the counterclaim was well pleaded. All the details of facts were stated and documents were attached. It eventually sought prayers that the counter claimant be declared a lawful tenant, granted an injunction and damages.

43. The evidence of DW1, DW2, DW3 and DW4 if considered together point to the demands in the counter claim. For instance all these witnesses complained about the procedure or method to have the counter claimant evicted. DW4, the L.C Secretary was emphatic and told court that he refused to allow the eviction of the counter claimant because it was out of procedure.

44. It was only in the written submission of both advocates on the court below that no mention was made of the counter claim.

In my view that never meant that the counter claimant had abandoned a claim which it pleaded and adduced evidence on. 0.8 r 13 CPR provides that a counter claim may be tried on its own.

45. The counterclaimant having adduced evidence on the matter before court, the trial court was under a duty to make a finding on that aspect of the case. In my view abandonment of a claim by a party before court is such a serious matter that court cannot assume it unless the parties are properly recorded to have said so.

Nevertheless the answer to the validity of his counter claim shall wait the court's decision on issue 5 dealing with evaluation of evidence.

46. ISSUE NO. 4

Whether the plaintiff's pleadings were a subject of an illegality by reason of offending the PPDA Act of 2003 – Public Procurement Disposal Assets Act 2003 with Regulations there under.

47. The above issue came from a complaint first raised in the submission of the defendant's advocate in the court below. He argued at page 3 of the written submission that the award of the tenancy to the plaintiff contravened S.80 (2) of the PPDA Act which required that such award be made through domestic bidding. Further that S.80 (1) provides for restricted domestic bidding without invitation of advertisement. There was no evidence that the requirement of the Act were complied with.

48. I believe that submission was further developed from the evidence of PW2 BWAYO PATRICK who was an estates officer from UR corporation. He said in his evidence that he did not know whether the disposal unit was involved but agreed that UR Corporation has a

procurement disposal unit. He agreed that there was no advertisement to dispose of plots 14-18 Go down road Arua Municipal and he did not know how the plaintiff got to know that the suit land was available for disposal.

49. In its judgment the lower court made no ruling on his complaint. Equally in its submission in rejoinder the plaintiff's advocate did not make any comments. In their submission on appeal the learned advocate for the appellants revived the issue. It was argued that the point raised concerned on illegality and court below ought to have pronounced itself on it. The authority of ***UGANDA RAILWAYS CORP. =VS= EWWARU & 5104 ORS ULR [2008] 319*** was cited to emphasize that question of illegality override all issues of pleadings including admissions. I agree with Mr. Kangolo to that extent. Matters involving illegality cannot be left hanging on the record.

50. In reply Mr. Ondoma for the respondent thought this matter could not be raised outside the requirement of 0.43 r (2) (1) CPR. This rule requires that only grounds of appeal that are stated to be argued. With respect to Mr. Ondoma, ground which raise points of law or illegality can be raised at any stage in the proceedings and do not need leave to do so. See MAKULA INTERNATIONAL LTD =VS= H.E. CARDINAL WIMBUGA & ANO [1982] HCB.

51. Mr. Ondoma's further reply to the complaint was that renting the property whose value in rent was as small as shs. 450.000/= per month could be done locally without the elaborate procedure of the PPDA Act 2003. He explained that could be the reason why the **defendant's** tenancy agreement of 2008 October was also never subjected to that procedure and it raised no complaint.

52. Under S.3 of the PPDA Act 2003 renting of property is defined to amount for a disposal of a public asset.

It would therefore be subject to the Act and its Regulations. The rule applicable here was Direct Procurement or Disposal. It is provided for under S.85 (1) and (2). It is defined as a disposal where a sole source procurement or disposal is used if exceptional circumstances prevent use of competition. It is used to achieve timely and efficient disposal.

The detailed procedure of competitive bidding is provided for under S.80 of the Act. If is were to be subjected to a contract just worthy shs. 450.000/= it would offend Regulation 85 (2) of the Public Procurement and Disposal of Public Assets Regulation 2003. The Regulation provides

85 (2).

> All procurement shall be conducted to deliver **best value for money irrespective of the method of procurement or disposing used,** procuring or disposing of an entity or the nature of the works services or supplies to be procured. (emphasis mine)

(3) **Value for money** shall be the optimum combination of the whole life costs and the appropriate total quality appropriate to meet the requirement of procuring or disposing of an entity"

53. It would therefore be an irrational decision to subject a contract whose value in just shs. 5.400.000/= per annum to the expensive process provided for under S.80 and ignore the alternative under S.85 of the PPDA Act 2003. I do believe exceptional circumstances relating to

cost and value-for-money test would justify the abandonment of the competitive bidding for direct disposal method. I therefore find no illegality was committed.

ISSUE FIVE

Whether the finding of the trial court to the effect that the plaintiff was the lawful tenant in the suit premises is supported by evidence and if so.

ISSUE 6

Whether the court pronounced contradictory remedies to the parties.

54. The above two issues will be answered separately but one will follow the other if so required.

55. In my view the case before the lower court depended much on what interpretation court to give to the documentary evidence before it. Evidence in the documents would lead court to the correct conclusion as to who is the rightful tenant on the suit premises.

56. The plaintiff testified as PW1 and tendered in court two exhibits which were relevant for court interpretation. Those were Exh. P2 and Exh. P3. Exh. P2 is a letter dated 12th October 2009 from the landlord to the plaintiff offering it a tenancy and the terms of the tenancy were spelt.

57. In the subsequent agreement Exh. P3 a tenancy agreement was created. It was with effect from 16/10/2009 to run for one year meaning it would expire on 15/10/2010. It required the tenant to pay rent quarterly in advance being shs. 1.000.000/=. However on

15/10/2009 vide Exh. P4 the plaintiff paid shs. 5.400.000/= which was rent from Oct 2009 to September 2010 for the suit premises. That payment sealed the offer of the tenancy over the premises.

58. The plaintiff then led evidence through PW2 the estates officer of the landlord who confirmed the above transactions to have occurred. That was the plaintiff's case.

59. On the defendant's side Exh. D1 was tendered in court. It is a tenancy agreement. It commenced on 1st/04/2005 to run for a one term of 9 (nine) months which means it would expire on 31/12/2005. Actually the 1st defendant as DW1 confirmed it in his evidence. He told court that agreement would expire in Jan. 2006. It appears after that the tenancy was renewed by monthly payments. That he had been in occupation for 17 years.

60. He presented to court receipts for payment. It may be taken as a fact admitted by defence that there was no formal tenancy between them and the landlord but they stayed in the premises because the landlord allowed them to so long as they paid rent. Mr. JABER confirmed that fact in cross-examination. He said

> "I was a tenant to Uganda Railways the tenancy was in the names of the 2nd defendant. It was signed in 2005, the agreement was for 9 months. I did not sign another agreement with URC. I did not sign in my own names".

Then he added

> "I do not have a rent agreement from October 2009 to date, the last agreement was in 2005"

61. It appears rent payable was maintained at shs. 100.000/= per month and the tenant continued paying rent which was accepted by the landlord. There are so many monthly rental receipts which were tendered in court and prove this point.

62. In my view from the evidence of DW1 and PW2 a periodical tenancy by conduct of paying rent for one month was created between the defendants and URC. There was no tenancy based on the expired tenancy agreement which DW1 agreed did not exist.

63. The issue would be whether this periodical tenancy was still in force at the time when the plaintiff demanded vacant possession. Evidence of PW2 and the contents of Exh. P5 is relevant on this issue.

In Exhibit P5 dated 12/10/2009 was written to the 1st defendant. It unfortunately referred to the clauses of expired tenancy but gave the immediate notice to vacate. The reason was **failure to pay rent for 4 months**.

64. PW2 orally told court he gave the defendants a letter dated 12/10/2009 to vacate but he refused to acknowledge receipt and people gathered and the situation became rowdy. In effect the letter was for immediate vacation.

As a periodical tenant for a period of one month the relationship solely depended on payment of rent in absence of which no tenancy at all exists. See ***JAVAD =VS= MOHAMAD AQIL [1992] WLR 1007***

Yet the onus to prove that such periodical payments were made for the tenancy to continue fell on the defendants. See ***DREAMGATE PROPERTIES LTD =VS= ARNOT [1997] P & CR 25*** or from LAND LAW Kevin Gray & Susan Gray Fourth Edition. 326.

65. In the present case about 2 weeks after being notified to vacate the defendants on 26/10/2009 paid shs. 450.000/= which would translate into 4 ½ months in arrears. In his judgment the trial Magistrate had this to say on this point,

> "To make matters worse for the defendants they did not pay rent for 4 months contrary to para.4 (a) (b) of both agreements……..which provided..….that the tenancy shall terminate and the landlord shall repossess the premises……."

69. The relevance of the above quotation is the court below also agreed that the tenant did not pay in time. I have only differed in reasoning. While the court below based its observation on expired tenancies, I have instead said a periodical tenancy based on rent payment was instead created and continued through out. However this one too was breached when the defendant did not pay rent for a period of 4 months.

70. At common law a periodical tenant is entitled to notice but that remains so as long is not in breach of the only important term of the relationship that is periodical rent payment. The moment the defendants elected not to pay rent, they breached the agreement and disentitled themselves from notice. The landlord has no obligation to give notice to a none-rent paying occupier of its premises. It would only worse its financial situation.

71. The subsequent payment of rent was of no consequence. It matters very little that the rent was received by the bankers of URC. All other receipts show that the defendants used to pay directly to URC. On the occasion when they were in breach, they changed the model of payment and paid to Stanbic bank using cash deposit slip of the URC. There is no way URC would have had the chance practically to accept

or reject the payment. Well they would have put their agent, the bank on notice not to accept the money if only all other payment were made to the bank. I am unable to hold them responsible for accepting rent for the reason that the defendant could have purposely paid to the bank to achieve the results they got, that is to say that URC does not get the chance to stop the payment and I cannot accept that.

72. In the result I find that the plaintiff presented more credible evidence in court and the trial court was right to find it the lawful tenant in the premises. That answer deposes of the counterclaim which now fails and the same is dismissed with costs.

ISSUE 6

73. **Whether court pronounced contradictory remedies.**

At page 5 of his judgment the trial Magistrate stated that the only logical conclusion he would make was that the plaintiff was a lawful tenant in the premises on plot 14-18 Go down road Arua Municipality. At page 11 the court made another finding and stated;-

> "In the instant case I agree with counsel for the defendants had a tenancy agreement with URC but not the plaintiffs. It would have been URC to sue the defendants and not the plaintiffs. The plaintiff is advised to seek assistance of URC to evict the defendants from the dispute premises if he still wishes to occupy the premises".

74. With respect to the trial Magistrate he contradicted himself. Having found that the plaintiff was the lawful tenant he had the duty to establish against which party the plaintiff's occupation was lawful.

75. I have already made four findings one that the plaintiff had a cause of action against both the defendants and second that the plaintiff's

action was not affected by the pleading of the defence of privity of contract consequently if the plaintiff was declared a lawful owner then it was against the defendants and never needed the help of URC. I therefore find that the plaintiff was entitled to an order of vacant possession and injunction against both the defendants.

76. I must comment on the need of court orders to be clear and precise. Court makes orders or decree to conclusively pronounce the right of parties. The language used by the trial court of advising a party to seek a remedy outside the court in a case before it was unfortunate.

In civil revision **No. 0002 of 2011 EDEBUA YONEMA =VS= BILENI MUSA** the trial court advised the parties to go to clan elders to solve a land matter that was before court instead of making a precise pronouncement of right of the parties. I blamed the trial court for using that kind of language and had this to state.

> "By declaring that there was no remedy to the parties, secondly but worse by ordering the clan to resolve a matter the trial Magistrate failed to exercise a jurisdiction vested in him. See S.5 CPA……the judgment of the trial court amounted to no judgment at all this is because it was out side the definition of a judgment as provided under S.2 (c) (1) of the CPA where it means "a statement given by the judge of the grounds of decree or order" the result of the learned trial Magistrate's judgment would have been a "decree". Under S.2 CPA a "decree" means a formal expression of an adjudication which so far as regards the court expressing it **conclusively determines the rights of the parties with regard to the matters in controversy in the suit". (**Emphasis added)

If the definition of a decree is as above, a judgment which advises a party to seek a remedy from elsewhere when one can be pronounced by that court is not a judgment

77. I must also say that in the court below through evidence of PW1 and PW3 and PW4 it was proved that defendant's conduct caused loss to the plaintiff I need not repeat the evidence here. However since the matter came on appeal there was a procedural requirement that the respondent cross-appeals. Had the respondent cross appealed, I would have awarded shs. 20.000.000/= (Twenty million) as general damages which I cannot do in absence of a cross appeal.

ISSUE 7

Whether the trial court rightly exercised its discretion when it denied the parties costs.

78. For the reasons I gave in my answers to issue 1, 2, 3, 4, 5 and 6 the trial court wrongly exercised its discretion to deny the successful plaintiff costs in respect of the main suit but was right to award costs to the defendant to the counterclaim. Since it attended and participated in the proceedings. Court was wrong to award costs to URC which it had said was not served and never participated in the proceedings.

79. The award of costs under S.27 CPA is discretionary but the same is a judicial discretion. Costs are denied with justifiable reasons see ***SHEIKH JUMA =VS= DUBAT FARAH [1959] EA 792 and WAMBOGO =VS= PUBLIC SERVICE COMMISSION*** or in matter of public interest litigation see **Mpuga Rukidi** (supra). No such reasons arose in the present case. The reason given that both the parties were not successful in the main suit was an error as I have

found above. The plaintiff was the successful party and the lower court also found so but then went ahead to contradict itself. I would award cost of the main suit to the respondent.

80. Back to the appeal I decided to approach this case as a re-trial in order to correct the so many mistakes that were committed. The answers to the issues court framed show that this appeal substantially fails on all the main grounds and is dismissed with costs. I substitute the orders of the lower court with the following orders;-

1. The plaintiff/respondent is he lawful tenant on the suit premises situate at plot 14 – 18 Do down road Arua Municipality.

2. The plaintiff/respondent is entitled to vacant possession of the let premises against the defendant/appellant.

3. The defendant/appellant are given 45 days from the date of judgment to vacate the suit premises failure of which be forcefully evicted.

4. The appellant will pay the costs of the suit below together with the cost of the counter claim to the respondent. In addition the appellant will pay the cost of this appeal.

NYANZI YASIN
JUDGE
03/04/2013

3/04/2013

Mr. Henry Odama for Edward Kangoho on brief for appellant.

Appellant present

Mr. Ondoma for respondent

Respondent in court.

Mr. Odama

The case is for judgment we are both ready to receive the judgment.

Court: Judgment delivered in the presence of the above.

Signed

NYANZI YASIN

JUDGE – 3/04/2013